

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Petition of AT&T Inc.)
for Settlements Stop Payment Order)
on the U.S.-Tonga Route)
_____)

IB Docket No. 09-10
DA 09-2422

REPLY COMMENTS OF DIGICEL (TONGA) LIMITED

Digicel (Tonga) Limited (“Digicel”), by its undersigned counsel, hereby replies to the comments filed by AT&T Inc. in support of AT&T’s own proposal that the Commission order U.S. carriers to pay no more than the \$0.19 benchmark rate for all traffic between the United States and Tonga, including traffic re-originated through third countries, to enforce the International Bureau’s two stop-payment orders issued in this proceeding.¹ AT&T’s comments offer no authority to rebut the jurisdictional and procedural obstacles facing both the Commission’s and the Bureau’s efforts to implement the AT&T proposal identified by Digicel in its recently submitted comments on this question.²

AT&T’s failure, or inability, to articulate a cognitive basis for the Commission to expand the scope of its International Benchmarks Policy, as requested by AT&T, confirms the serious legal issues that such an effort would present. Most telling is AT&T’s summation that Section 2(a) of the Communications Act gives the Commission authority over “‘foreign communications by wire or radio,’ regardless of whether such communication is sent via direct or indirect routing

¹ Comments of AT&T Inc., filed January 6, 2010 (hereinafter, “AT&T Comments”). *See Second Order and Request for Further Comment*, DA 09-2422, released, November 16, 2009, ¶¶ 8-9.

² Comments of Digicel (Tonga) Limited, filed January 6, 2010 (hereinafter, “Digicel Comments”).

arrangements.”³ Significantly, the statutory language does not include AT&T’s qualitative gloss: “regardless of whether such communication is sent via direct or indirect routing arrangements.”⁴ Instead, the statute defines “foreign communications” simply as communication between a place in the United States and a place in a foreign country.⁵ As Digicel explained in its initial comments, based on this seminal definition underlying the scope of its jurisdiction over international communications, the Commission has been careful not to attempt to interpret its International Settlement Policy to exert authority directly over foreign carriers or over routes between two foreign countries.⁶ Yet, AT&T’s proposal would for the first time require the Commission to do precisely that.

Nor is AT&T able to find any support for its legal gloss in the language of the Commission’s *Benchmarks Order*.⁷ In the sections of that order cited by AT&T, the Commission stated only that the “enforcement measures” in support of its policy that it would consider are (1) seeking the support of foreign governments to encourage foreign carriers to make “meaningful progress” to negotiate settlement rates at or below the relevant benchmark and, failing that, (2) allowing affected U.S. international carriers to request the Commission to consider “stronger steps.”⁸ More importantly, in a passage of the *Benchmarks Order* that AT&T chose not to cite, the Commission concluded that it has authority to employ “any of the enforcement measures proposed in the Notice [of Proposed Rulemaking] to respond to a carrier’s

³ AT&T Comments, at 5-6.

⁴ 47 U.S.C. §152(a).

⁵ 47 U.S.C. §153(17).

⁶ Digicel Comments, at 2-6.

⁷ In the Matter of International Settlement Rates, *Report and Order*, 12 FCC Rcd 19806 (1997).

⁸ AT&T Comments, at 5. See *Benchmarks Order*, at 19893-94.

petition.”⁹ Again, in the Notice of Proposed Rulemaking for the adoption of its International Benchmarks Policy, the Commission did not include regulation of reoriginated traffic to a foreign market among its anticipated enforcement measures.¹⁰

Nor is AT&T’s reference to the Commission’s adoption of a “best practice” rate of any relevance to the discussion of the Commission’s ability to enforce benchmarks on reoriginated traffic. The Commission adopted the concept of a “best practice” rate in its *Benchmarks Order* as a safeguard against detected distortions in the U.S. market for International Message Telephone Service (“IMTS”). It is a specialized tool, however, intended to be employed only to the extent carriers seek authorization to provide facilities-based service from the United States to markets with which they are affiliated, and to provide private line resale service.¹¹ The concept is in no manner related to reoriginated or indirectly routed traffic.

Judicial decisions relied on by AT&T in its comments support the need for the Commission to weigh carefully the international ramifications of any effort on its part to expand the enforcement of its International Benchmark Policy to apply to reoriginated traffic passing between the jurisdictions of two or more foreign countries, and potentially involving settlements between non-U.S. carriers. As noted by the appeals court in *Laker Airways Limited v. Sabena*, “no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations.”¹² And, again, in the case the *Republic of Philippines v. Westinghouse Electric Corp.*, the court observed:

⁹ *Id.*, at 19894.

¹⁰ In the Matter of International Settlement Rates, *Notice of Proposed Rulemaking*, 12 FCC Rcd 6184, 6216-17 (1996).

¹¹ *Benchmarks Order*, 19869-70.

¹² 731 F.2d 909, 937 (D.C. Cir. 1984).

“But while it is true that principles of comity cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state, it can – and does – force courts in the United States to tailor their remedies carefully to avoid undue interference with the domestic activities of other sovereign nations. Comity is essentially a version of the golden rule: a ‘concept of doing to others as you would have them do to you...’.”¹³

Rather than attempt to define a jurisdictional basis for either the Bureau or the Commission to enforce benchmark rates on reoriginated traffic, AT&T focuses a substantial portion of its comments on the “generosity” of the Commission’s benchmark rates when compared to what AT&T perceives to be the actual cost of terminating international traffic in Tonga.¹⁴ This line of argument, however, is completely premature in light of the significant jurisdictional and procedural issues that the Commission must first consider; namely, whether it has authority to enforcement its International Benchmark Policy in the manner AT&T requests, whether the Bureau has delegated authority to do so, and whether the expansion of the policy can be effected by means of the instant complaint proceeding rather than through a formal Notice of Inquiry or rulemaking.

AT&T’s advocacy for its proposal suffers from yet another shortcoming. It argues that application of the Commission’s benchmark rates to reoriginated traffic would not disrupt internationally routed traffic patterns to Tonga or prevent U.S. consumers from making calls there, but would only prevent U.S. carriers from paying any amount in excess of the \$0.19 benchmark rate for such traffic.¹⁵ Yet, AT&T offers no analysis to support its assertion, which is completely at variance with its experience and that of Verizon when they attempted to enforce benchmark rates on their direct correspondent relationships for termination of traffic in Tonga. AT&T’s comfortable words on this subject cannot be allowed to divert the Commission from

¹³ 43 F.3d 65, 75 (3d Cir. 1994).

¹⁴ AT&T Comments, at 4, 6-7.

¹⁵ *Id.*, at 3, 7.

considering the potential impact of AT&T's proposal on the recognized public benefits of reoriginated and refiled traffic as a means of lowering costs for IMTS customers.¹⁶ This is a particularly important consideration given the fact that the Commission has emphasized that its International Settlement Policy is designed to protect U.S. ratepayers, not U.S. carriers.¹⁷

Finally, AT&T's encouragement for the Bureau to take steps to expand the enforcement of the Commission's International Benchmark Policy within the context of the present proceeding is gravely superficial, and fails to account for the limitations of delegated authority under the Commission's procedural rules.¹⁸ The use of the present complaint proceeding as a vehicle to consider the merits of AT&T's proposal is particularly inappropriate given the continued pendency of a separate Commission Notice of Inquiry specifically designed to examine ways to improve enforcement of the Commission's anti-whipsawing policies.¹⁹

Significantly, no other party to this proceeding - including Verizon, which joined with AT&T to request imposition of the Bureau's stop-payment orders on carriers with correspondent relationships with both Tonga Communications Corporation and Digicel²⁰ - has submitted comments in support of AT&T's proposal. This indicates a lack of industry support for AT&T's position, which presents problems of both legal authority and practical implementation.

Digicel hereby reaffirms its positions, explained in detail in its initial comments, that the Bureau lacks both substantive and procedural authority to pursue consideration of the AT&T

¹⁶ See Digicel Comments, at 7-9.

¹⁷ Implementation and Scope of Uniform Settlements Policy for Parallel Communications Routes, *Report and Order*, 51 Fed.Reg. 4736 (1986), ¶ 23; *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1390 (D.C. Cir. 1995).

¹⁸ AT&T Comments, at 1. See Digicel Comments, at 9-11.


¹⁹ In the Matter of Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Behavior, IB Docket 05-254.

²⁰ See Comments of Verizon, filed February 19, 2009; Reply Comments of Verizon, filed July 23, 2009.

proposal, and that any effort to implement the proposal would require initiation of a formal rulemaking by the full Commission. Moreover, given the Commission's admitted lack of a comprehensive record on the subject of alternative international termination arrangements, if the Commission does elect to pursue this subject further, its first step should be by means of a Notice of Inquiry, and it could consider asking that the record in IB Docket 05-254 be refreshed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gloria Hanna, certify that copies of the foregoing Reply Comments of Digicel (Tonga) Limited were delivered via e-mail and/or postage prepaid on this day, Wednesday, January 20, 2010 to the following:

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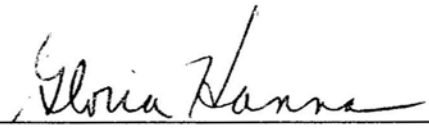
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